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No. 99-475

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STANLEY T. TORRES and JEANNE H. RAYPHAND,

Appellants,

v.

MIGUEL M. SABLAN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JOINT MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the district court properly granted summary judgment to Appellees:

1. When undisputed evidence proved that equal representation of the islands of Saipan, Tinian and Rota in the Northern Mariana Islands Senate was essential to the formation of the Commonwealth of the Northern Mariana Islands, and to its political union with the United States under a negotiated and congressionally approved international agreement; and

2. When no evidence or authority showed that population-based representation in both houses of a bicameral legislature is the basis of all free government, and thus is a fundamental federal constitutional right under the *Insular Cases* doctrine developed in *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); and *Downes v. Bidwell*, 182 U.S. 244 (1901).

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Appendix — Constitutional Provisions And Federal Laws Involved 8a

Pursuant to United States Supreme Court Rule 18.6, Appellees Miguel M. Sablan, et al., Commonwealth of the Northern Mariana Islands (CNMI), Eleventh Northern Marianas Commonwealth Legislature, Mayor of Tinian and Mayor of Rota move to affirm the unanimous and unreported decision of the three-judge district court. This case involves an equal protection challenge under the Fifth and Fourteenth Amendments to the composition of the CNMI Senate, in which the CNMI's three senatorial districts each have three senators. This apportionment, pursuant to the CNMI Constitution, implements a requirement of equal Senate representation contained in the negotiated international agreement which defines the CNMI's relationship with the United States: The Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America, Pub. L. No. 94-241, 90 Stat. 263, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 & note (West Supp. 1999) (Covenant).

The district court held that the CNMI Senate's composition neither violates federal equal protection guarantees nor falls within the population-based apportionment rule applicable to state legislatures under *Reynolds v. Sims*, 377 U.S. 533 (1964). The court entered summary judgment for Appellees upon undisputed evidence and law, which proved that population-based representation in both houses of a bicameral legislature is not the basis of all free government, and thus is not a fundamental federal constitutional right applicable automatically in the CNMI under the *Insular Cases* doctrine developed in *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); and *Downes v. Bidwell*, 182 U.S. 244 (1901). J.S. App. 14a-17a.

Summary affirmance is appropriate because this fact-bound case presents no substantial federal question warranting plenary review. It has no conceivable impact or importance outside of the Northern Mariana Islands, and thus lacks the national significance required for such review. Equally important, the district court correctly applied the *Insular Cases* doctrine to

the undisputed material facts in this *sui generis* case. Fairness and judicial economy dictate summary affirmance of the judgment for Appellees.

OPINION BELOW

The district court's summary judgment order (J.S. App. 1a-17a) and judgment (Mot. App. 1a-2a) are unreported. They also are not available on Westlaw, Lexis, the Internet websites referenced by Appellants (J.S. 24) or any other computerized research service.

STATEMENT OF JURISDICTION

Appellants invoked jurisdiction in the district court under 48 U.S.C. § 1822(a), 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1343(a)(4). They sought declaratory and injunctive relief under 28 U.S.C. § 2201 and 42 U.S.C. § 1983. J.S. App. 28a, 34a-36a. A three-judge district court was convened under 28 U.S.C. § 2284(a), which applies to the district court pursuant to 48 U.S.C. § 1821(c), Covenant Section 403(b) and Covenant Section 502(a)(2). *See also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 670-676 (1974) (Commonwealth of Puerto Rico held to be a "State" under former 28 U.S.C. § 2281, which required three-judge district courts in actions to enjoin State statutes as unconstitutional). The district court granted summary judgment to Appellees and denied summary judgment to Appellants on May 5, 1999. J.S. App. 1a, 6a n.5, 18a-24a.

Before entry of judgment, Appellants noticed an appeal to this court on May 5, 1999. J.S. App. 37a. The district court entered judgment for Appellees on May 14, 1999. Mot. App. 1a-2a. This court may exercise jurisdiction notwithstanding the absence of a final judgment at the time Appellants noticed their appeal. *Bankers Trust Company v. Mallis*, 435 U.S. 381, 384-385 (1978). After Appellants filed a jurisdictional statement, this court docketed the appeal on September 20, 1999.

Appellants invoke this court's jurisdiction under 28 U.S.C. § 1253. J.S. App. 38a. Section 1253 applies to appeals from the district court pursuant to 48 U.S.C. § 1821(c), Covenant Section 403(b) and Covenant Section 502(a)(2). *See Calero-Toledo*, 416 U.S. at 670-676.

CONSTITUTIONAL PROVISIONS AND FEDERAL LAWS INVOLVED

The constitutional provisions involved are: (1) the United States Constitution's Fifth Amendment, Fourteenth Amendment Equal Protection Clause and Territorial Clause (Art. I, Sec. 3, Cl. 2); and (2) Section 2(a) of the Northern Mariana Islands Constitution.

Additional federal laws involved are Sections 105, 203(c) and 501 of the Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States Of America, Pub. L. No. 94-241, 90 Stat. 263, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 and note (West Supp. 1999). These authorities appear in the appendix to this motion. Mot. App. 8a-11a.

STATEMENT OF THE CASE

The Covenant embodies "the unique political relationship between the [C]NMI and the United States." *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684, 691 & n.28 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984). "The Covenant is an executive agreement under United States law, authorized by the executive recognition power and the President's power as Commander-in-Chief of the armed forces." Lizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau and Guam*, 31 HARV. INT'L L.J. 257, 272 (1990). (Def. Exh. 9).

> The Covenant is a permanent and binding agreement entered into between two sovereign peoples . . . [¶] Its composition is complex and its identity

> unique. It is a binding commitment by two peoples with certain provisions being so sacrosanct as to be unchangeable without the consent of both parties.

Wabol v. Villacrusis, 1 N. Mar. I., 19, 22 (1989) (citation omitted), *rev'd on other grounds*, 11 F.3d 124 (9th Cir. 1993). This unprecedented relationship followed nearly three decades of United States trusteeship jurisdiction over the Northern Mariana Islands as part of the Trust Territory of the Pacific Islands (TTPI).

I. Pre-Commonwealth Trust Territory of the Pacific Islands

On July 18, 1947, pursuant to a congressionally approved international agreement with the United Nations, the United States assumed trusteeship responsibility for three West Pacific island chains commonly known as Micronesia, which the United States had occupied since World War II. TRUSTEESHIP AGREEMENT FOR THE FORMER JAPANESE MANDATED ISLANDS, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665 (Trusteeship Agreement). These Micronesian islands became the TTPI. The TTPI consisted of the Marshall Islands and the Caroline Islands, as well as the Northern Mariana Islands located about 100 miles north of Guam and 3900 miles west of Honolulu. *Saipan Stevedore v. Director, Workers' Comp. Programs*, 133 F.3d 717, 720 (9th Cir. 1998); *McComish v. C.I.R.*, 580 F.2d 1323, 1324 (9th Cir. 1978).

The Northern Mariana Islands are a chain of 21 small islands collectively comprising about 184 square miles of land surface. S. REP. NO. 596, 94TH CONG. 2D SESS. 2 (1976), *reprinted in* 2 1976 U.S. CODE, CONG. & ADMIN. NEWS 448, 449 (Def. Exh. 2).[1] The three largest and most populous islands are Saipan (47 square miles), Tinian (39 square miles) and Rota

1. Defendants' Exhibits (Def. Exh.) 1 through 15 were filed as attachments to the Declaration of Robert Goldberg. Appellee Eleventh Legislature's Exhibits (Leg. Exh.) A through JJ were filed either as separate documents or as attachments to the Declarations of Stephen C. Woodruff, Michael W. Dotts and Herbert Del Rosario.

(32 square miles). The population in the Northern Mariana Islands exceeded 43,000 in 1990, and grew to nearly 60,000 by 1997. Pl. Exh. at 002, 004; *Saipan Stevedore*, 133 F.3d at 720. According to 1990 federal census data, Saipan had approximately 90 percent of the population. Tinian and Rota each had about 5 percent. Pl. Exh. 002, 004.

To fulfill its trusteeship responsibilities, "the United States — through the Department of the Interior — created a bureaucracy known as the Trust Territory government." *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 649 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990). The Trust Territory government initially consisted of executive and judicial branches. It later included a bicameral Congress of Micronesia for the entire TTPI, as well as six local district legislatures. *McComish*, 580 F.2d at 1329. "Ultimate discretionary control over the Trust Territory government was retained by the Secretary of the Interior." *Temengil*, 881 F.2d at 650.

The United States did not have sovereignty in the Northern Mariana Islands or anywhere else in the TTPI. *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1371 n.1 (9th Cir. 1988), *aff'd*, 495 U.S. 182 (1990); *Ralpho v. Bell*, 569 F.2d 607, 619 n.71 (D.C. Cir. 1977); *Temengil v. Trust Territory of the Pacific Islands*, 33 Fair Empl. Prac. Cas. (BNA) 1027, 1031-1032 & n.16 (D.N. Mar. I. 1983), *rev'd on other grounds*, 881 F.2d 647, 649 n.1, 650 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990); *People of Saipan v. United States Department. of Interior*, 356 F. Supp. 645, 650 n.10, 653 n.18 (D. Haw 1973), *aff'd as modified on other grounds*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

"[S]overeignty [wa]s held in trust and ultimately repose[d] in the Trust Territory's inhabitants rather than in the United States, its Trust Territory government or the United Nations." *Temengil*, 33 Fair Empl. Prac. Cas. at 1032 n.16; *accord Porter v. United States*, 496 F.2d 583, 588 n.4 (Cl. Ct. 1974), *cert. denied*, 420 U.S. 1004 (1975) (collecting cases). "The

relationship between the United States and the Trust Territory's people [wa]s 'a fiduciary one . . . [in which] the interests of the inhabitants of the territory bec[a]me paramount.' " *Temengil*, 33 Fair Empl. Prac. Cas. at 1032 & n.17 (collecting authorities); *accord id.*, 881 F.2d at 649 n.1. *See also* SECOND INTERIM REPORT OF THE NORTHERN MARIANA ISLANDS COMMISSION ON FEDERAL LAWS TO THE CONGRESS OF THE UNITED STATES 38-42 (1985) (report pursuant to Covenant Section 504 analyzing federal-TTPI trust relationship and recommending that Congress continue to treat the CNMI as a trust relationship).

"The paramount duty of the United States was to steward Micronesia to self government." *Temengil*, 881 F.2d at 649; *accord Saipan Stevedore*, 133 F.3d at 720; *Gale v. Andrus*, 643 F.2d 826, 832 (D.C. Cir. 1980). Article 6.1 of the Trusteeship Agreement required the United States in relevant part to "promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned [.]" 61 Stat. 3302-3303. By the 1970's, however, "there d[id] not appear to have been any significant delegation of authority to the citizens of the Trust Territory" and the United States still exercised "a maximum degree of control [.]" *People of Saipan*, 356 F. Supp. at 655.

II. Negotiations For Commonwealth Status Under The Covenant

In 1969, the United States began negotiations with the Micronesians to determine Micronesia's future political status. In 1972, the United States entered into separate negotiations with the Northern Mariana Islands, whose residents wanted United States citizenship under a closer and permanent relationship with the United States that would accommodate their unique history, culture and conditions. *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 751 (9th Cir. 1993). *See generally* S. REP. NO. 433, 94TH CONG. 1ST SESS. 21-

22, 39-58 (1975) (S. REP. No. 433) (Leg. Exh. DD); Don A. Farrell, HISTORY OF THE NORTHERN MARIANA ISLANDS 589-598 (1991) (Def. Exh. 7); Arnold A. Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L L.J. 19 (1981). The Northern Mariana Islands had sought such a relationship with the United States since 1950, and in 1971 had threatened to secede forcibly from the TTPI in order to obtain it. S. REP. No. 433 at 18, 20, 45 (Leg. Exh. DD).

The conflicting interests of Saipan, Tinian and Rota complicated the negotiations for both sides. As noted by future United Nations Ambassador Donald F. McHenry in his analysis of the Covenant negotiations and the trusteeship:

> One issue which lay in the background of the Marianas negotiations and which may cause problems later was disagreement . . . between Rota, Tinian and Saipan. The people of Tinian objected to the apparent ease with which other Mariana Islanders particularly those on Saipan, were willing to negotiate land on Tinian; Rota . . . objected to the dominant role of Saipan.

Donald F. McHenry, MICRONESIA: TRUST BETRAYED 163 (1975) (MICRONESIA) (Pl. Exh. at 111).

After more than two years, the negotiations resulted in the Covenant. "Some of the differences between the Marianas were smoothed over in the [C]ovenant [.] . . . *By far the major protection for Tinian and Rota is a [C]ovenant provision that the Marianas Legislature be bicameral with one house of equal representation.*" *Id.* (emphasis added). This provision appears in Covenant Section 203(c). Although the Covenant makes both the Fifth Amendment and the Fourteenth Amendment's Equal Protection Clause applicable in the CNMI, the Covenant specifically qualifies that their application is "without prejudice to the validity of and the power of the Congress of the United States to consent to sectio[n] 203 [.]" COVENANT SECTION 501(b). Covenant Section 105 includes Section 203 among the

fundamental Covenant provisions which may be modified only with the mutual consent of the United States and the CNMI.

Formal approval of the Covenant occurred quickly after its signature by the parties thereto on February 15, 1975. *See generally* HISTORY OF THE NORTHERN MARIANA ISLANDS 599-605 (Def. Exh. 7). Within a week, the Marianas District Legislature unanimously approved the Covenant after reviewing it as required by Covenant Section 1001(a). Res. 76-1975, Fourth Mariana Islands District Legislature, 5th Sess. (Feb. 20, 1975), *reprinted in Hearing Before the Subcommittee On Territorial And Insular Affairs of the House Committee on Interior and Insular Affairs on H.J. Res. 549 et al.*, 94th Cong. 1st Sess. 608-610 (1975) (*H.J. Res. 549 Hearing)* (Leg. Exh. CC). On June 17, 1975, the people of the Northern Mariana Islands approved the Covenant by a 78.8 percent vote, with 95 percent of all registered voters turning out at the polls. Super-majorities approved the Covenant on every island, including Saipan. H.R. REP. NO. 364, 94TH CONG. 1ST SESS. 4 (1975) (Leg. Exh. EE); *H.J. Res. 549 Hearing* at 378, 381 (Leg. Exh. CC). Following congressional approval, President Ford signed the Covenant into law on March 24, 1976. 12 WEEKLY COMP. PRES. DOC. 482 (Mar. 24, 1976) (Leg. Exh. JJ).

In accordance with Covenant Section 201, the Northern Mariana Islands held a constitutional convention, which drafted a constitution overwhelmingly ratified by voters in March 1977. *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990), *cert. denied sub nom. Philippine Goods, Inc. v. Wabol*, 506 U.S. 1027 (1992). Section 2(a) of the CNMI Constitution implemented Covenant Section 203(c) by apportioning three senators to each of the CNMI's three senatorial districts: (1) Rota; (2) Tinian and Aguiguan; and (3) Saipan and islands north of Saipan. J.S. 2.

As provided by Covenant Section 202, the CNMI Constitution automatically took effect on October 22, 1977, six months after its submission to the United States Government.

President Carter memorialized the effective date of approval two days later. PRESIDENTIAL PROCLAMATION No. 4534, 42 FED. REG. 56,593 (October 24, 1977). Pursuant to Covenant Sections 101 and 1003(c), the CNMI came under United States sovereignty for the first time when President Reagan terminated the trusteeship in November 1986. PRESIDENTIAL PROCLAMATION No. 5564, 51 FED. REG. 40,399 (November 3, 1986).

The instant action under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 for declaratory and injunctive relief challenges the constitutionality of Covenant Section 203(c) and CNMI Constitution Section 2(a). Appellants seek a declaration that the CNMI Senate's composition violates the Fourteenth Amendment's Equal Protection Clause, specifically the rule of population-based state legislative apportionment under *Reynolds v. Sims*, 377 U.S. 533 (1964). J.S. at 9-15; J.S. App. 26a, 32a, 34a, 35a.[2] Appellants further seek an injunction ordering a special election to choose a CNMI Senate apportioned by population. J.S. App. 26a, 27a, 35a.

A three-judge district court, convened under 28 U.S.C. § 2284(a), unanimously upheld the constitutionality of Covenant Section 203(c) and CNMI Constitution Section 2(a). J.S. App. 1a, 6a n.5, 8a-24a. This appeal under 28 U.S.C. § 1253 followed. J.S. App. 37a.

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2. The Fourteenth Amendment does not restrain federal action. On appeal, Appellants for the first time appear to raise a *Bivens* claim for federal violation of the Fifth Amendment's equal protection component. *See* J.S. 3, 6-7, 15; *Davis v. Passman*, 442 U.S. 228, 242-243 (1979). This court may disregard this new argument, which does not alter the basic issue. *National Collegiate Athletic Association v. Smith*, __ U.S. __, 119 S. Ct. 924, 930 (1999). Because equal protection guarantees under the Fifth and Fourteenth Amendments are coextensive, equal protection analysis is the same under both Amendments. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217, 224, 234 (1995). The district court addressed Fifth Amendment equal protection doctrine by deciding the case in part in terms of congressional authority to approve Covenant Section 203(c). *See* J.S. App. 8a-9a, 14a-15a, 17a.

ARGUMENT

I. This Case Has No Impact Or Importance Outside Of The Northern Mariana Islands

In a letter to Congress supporting elimination of its mandatory appellate jurisdiction, this court lamented the burden imposed by "cases that are of significance only to the individual litigants but of no 'wide public importance.' " H.R. REP. NO. 660, 100TH CONG. 2D SESS. 27 (1988), *reprinted in* 4 1988 U.S. CODE, CONG. & ADMIN. NEWS 766, 782. This is such a case.

Summary affirmance is appropriate because this case has no national significance. It is fact-bound and has no conceivable impact or importance outside of the CNMI. As Appellants note, local legislative apportionment is governed by *Reynolds v. Sims* in the fifty States, and by congressional legislation in Guam, Puerto Rico and the Virgin Islands. J.S. 25. The unreported decision below does not affect any other jurisdiction or people under the American flag. It is *sui generis*, as are the Covenant and the CNMI's commonwealth relationship with the United States. *Richards*, 4 F.3d at 754; *Atalig*, 723 F.2d at 684, 691 n.28.

The decision's unreported status reflects its lack of national significance. It is not available in any national or regional publication, nor is it posted on Westlaw, Lexis, the Internet websites referenced by Appellants (J.S. 24) or any other computerized research source. In fact, it may not even be citable in the Ninth Circuit, where the district court which rendered it sits. *Compare People of the Territory of Guam v. Yang*, 800 F.2d 945, 947 n.2 (9th Cir. 1986) (unpublished district court decisions are citable) *with Prestin v. Mobil Oil Corp.*, 741 F.2d 268, 270 n.3 (9th Cir. 1984) (unpublished district court decisions are not citable).

Since the CNMI came into being, this court has denied review without dissent in all cases from the CNMI. Two cases involved Covenant restrictions of constitutional rights at least

as cherished, if not more so, than those asserted here. One case upheld the Covenant's denial in CNMI courts of the right to jury trial in serious criminal cases which applies in state courts under *Duncan v. Louisiana*, 391 U.S. 145 (1968). *Atalig*, 723 F.2d at 684-691, *cert. denied*, 467 U.S. 1244. The second case rejected an equal protection challenge to the Covenant's restriction of CNMI land ownership to the indigenous people of the CNMI. *Wabol*, 958 F.2d at 1452, 1458-1462, *cert. denied*, 506 U.S. 1027. The right to jury trial denied in *Atalig* " 'lies at the base of all our civil and political institutions' " as part of the constitutional guarantee of a fair trial, "the most fundamental of all freedoms." *Duncan*, 391 U.S. at 148-149; *Estes v. Texas*, 381 U.S. 532, 540 (1965). The property rights denied in *Wabol* also are constitutionally sacred. "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972); *accord Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Given the determination that *Atalig* and *Wabol* warranted *no* review, this case clearly does not warrant *plenary* review.[3]

With one exception, this court also denied without dissent every pre-commonwealth certiorari petition originating in the TTPI. Several unreviewed cases involved the Trusteeship

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3. *See also Angello v. Commonwealth of the Northern Mariana Islands*, 106 F.3d 406 (9th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 87 (1997); *Ferreira v. Borja*, 93 F.3d 671 (9th Cir. 1996), *cert. denied*, 519 U.S. 1122 (1997); *Commonwealth of the Northern Mariana Islands v. Condino*, 33 F.3d 58 (9th Cir. 1994), *cert. denied*, 514 U.S. 1021 (1995); *Aldan-Pierce v. Mafnas*, 31 F.3d 756 (9th Cir. 1994), *cert. denied*, 513 U.S. 1116 (1995); *Commonwealth of the Northern Mariana Islands v. Kawano*, 917 F.2d 379 (9th Cir. 1990), *cert. denied*, 499 U.S. 910 (1991); *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988); *Temengil v. Trust Territory of the Pacific Islands*, 33 Fair Empl. Prac. Cas. (BNA) 1027 (D.N. Mar. I. 1983), *rev'd*, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

Agreement's enforceability in federal court and the legality of United States nuclear weapons testing in the TTPI.[4] The only case reviewed was the McCarthy era case of *Vitarelli v. Seaton*, 359 U.S. 535 (1959), which held that the Interior Department wrongfully fired one of its TTPI teachers based in part upon his political associations and beliefs. This holding protected Interior Department employees nationwide and abroad from similar mistreatment. Unlike the instant case, *Vitarelli* transcended its immediate parties, facts and locality.

Apart from *Vitarelli*, cases arising in the CNMI and the former TTPI have lacked the widespread impact or importance required for review. So does this case. Unlike other Pacific Basin cases pending in this court, the instant case involves neither alleged racial discrimination with broad public implications nor an inter-circuit conflict requiring resolution.[5] This case has no

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4. *People of Saipan v. United States Department of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); *Nitol v. United* States, 7 Cl. Ct. 405 (1985), *dismissed* 12 Cl. Ct. 690 (1987), *aff'd*, *People of Enewatak v. United States*, 864 F.2d 134 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 909 (1989); *Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960). *See also United States v. Covington*, 783 F.2d 1052 (9th Cir. 1985), *cert. denied*, 479 U.S. 931 (1986); *Groves v. United States*, 533 F.2d 1376 (5th Cir.), *cert. denied*, 429 U.S. 1000 (1976); *Porter v. United States*, 496 F.2d 583 (Cl. Ct. 1974), *cert. denied*, 420 U.S. 1004 (1975); *Callas v. United States*, 152 F. Supp. 17 (E.D.N.Y. 1957), *aff'd*, 253 F.2d 838 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958).

5. In *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998), *cert. granted*, __ U.S. __, 119 S. Ct. 1248 (1999) (No. 98-818), the petitioner contends that a Hawaii state constitutional provision allowing only Native Hawaiians to vote for trustees of the Office of Hawaiian Affairs constitutes racial discrimination barred by the Fourteenth and Fifteenth Amendments. In *Ada v. Government of Guam*, 179 F.3d 672 (9th Cir.), *cert. granted*, __ U.S. __, 120 S. Ct. 34 (1999) (No. 99-51), the Ninth Circuit's construction of a Guam Organic Act section on gubernatorial elections rejected the Third Circuit's construction of virtually identical language in the Virgin Islands Organic Act.

significance beyond the CNMI. For this reason alone, the three-judge district court's unanimous decision should be summarily affirmed.

II. The Three-Judge District Court's Unanimous Decision Was Correct

Plenary review is unwarranted not only because this case lacks national significance, but also because the three-judge district court's unanimous decision was correct. The undisputed evidence required summary judgment for Appellees, and the district court properly rejected Appellants' equal protection challenge to the constitutionality of Covenant Section 203(c) and CNMI Constitution Section 2(a).

A. Under The *Insular Cases* Only Rights Which Are The Basis Of All Free Government Are Fundamental Constitutional Rights Which Apply Of Their Own Force In The Northern Mariana Islands

The central issue is whether federal equal protection doctrine makes applicable in the CNMI the population-based rule of state legislative apportionment announced in *Reynolds v. Sims*, 377 U.S. 533 (1964), notwithstanding the Covenant's mandate of equal representation of Saipan, Tinian and Rota in the CNMI Senate. This issue turns upon the evidence as analyzed under the *Insular Cases* doctrine of "fundamental rights" developed primarily in *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); and *Downes v. Bidwell*, 182 U.S. 244 (1901).[6] This court most recently

6. The other *Insular Cases* are *Ocampo v. United States*, 234 U.S. 91 (1914); *Dowdell v. United States*, 221 U.S. 325 (1911); *Rassmussen v. United States*, 197 U.S. 516 (1905); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. N.Y. & P.R. Steamship Co.*, 182 U.S. 392 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); (Cont'd)

reaffirmed the *Insular Cases* doctrine in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-269 (1990); *accord id.* at 277-278 (Kennedy, J., concurring). Appellants concede that "the district court was right to employ the *Insular Cases* doctrine as the rule of decision in this case [.]" J.S. 5.

Under the *Insular Cases* doctrine, the entire United States Constitution automatically applies of its own force, without congressional action, only as to "incorporated" territories, which are territories "destined for statehood from th[eir] time of acquisition" by the United States. *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.26 (1976); *Downes*, 182 U.S. at 311 (White, J., concurring). The States of Alaska and Hawaii were incorporated territories. *See Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4-5, 8 n.12 (1955). The CNMI is not an incorporated territory. *See Atalig*, 723 F.2d at 691 & n.28.

In "unincorporated" territories not destined for statehood, only "fundamental" constitutional rights apply of their own force. Others apply only if extended by Congress pursuant to the Territorial Clause or another federal source of authority. *Verdugo-Urquidez*, 494 U.S. at 268; *Otero*, 426 U.S. at 599 n.30; *Balzac*, 258 U.S. at 304-305.

Courts have treated the CNMI as unincorporated for purposes of the *Insular Cases* doctrine, even though the CNMI, a *sui generis* Commonwealth, is not a "territory" in the sense of being a federal instrumentality subject to plenary federal control. *Wabol*, 958 F.2d at 1459-1460 & n.18; *Atalig*, 723 F.2d at 687 & n.15, 691 & n.28; *see* Covenant Section 105; *Richards*,

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(Cont'd)

and *DeLima v. Bidwell*, 182 U.S. 1 (1901). *See generally* James E. Kerr, THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM 27-111 (1982); Arnold H. Leibowitz, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 17-29 (1989); Juan R. Torruela, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 40-84, 93-115 (1985); Frederick Coudert, *The Origins of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926).

4 F.3d at 754-755; *Commonwealth of the Northern Mariana Islands v. Peters*, 1 N. Mar. I. 466, 472-473 (1991). *Compare United States v. Wheeler*, 435 U.S. 313, 321 (1978) (territorial governments are federal agencies); *O'Donoghue v. United States*, 289 U.S. 516, 537 (1933) (a territory is a federal "governmental subdivision" which "quite as well could have been called a 'colony' or a 'province' "). The term "unincorporated territory" also was deemed sufficiently elastic to encompass the TTPI, even though the United States lacked sovereignty there. *See Ralpho*, 569 F.2d at 618-619 & nn.69-70; *Temengil*, 33 Fair Empl. Prac. Cas. at 1058-1060 & n.121; *Sechelong v. Trust Territory of the Pacific Islands*, 2 T.T.R. 526, 529-530 (H. Ct. Tr. Div. 1964).

Under the *Insular Cases* doctrine, "fundamental rights" which apply of their own force in unincorporated territories consist of "limitations in favor of personal rights" which are "indispensable" as "the basis of *all free government*." *Dorr*, 195 U.S. at 146, 147 (emphasis added); *accord Downes*, 182 U.S. at 282-283; *id.* at 290-291 (White, J., concurring). When applying the *Insular Cases* fundamental rights concept in Covenant cases, the Ninth Circuit interprets it to connote a "narro[w] definition of fundamentalness" in "th[e] *international* sense." *Wabol*, 958 F.2d at 1460 (emphasis by court). This interpretation comports with Justice White's view, which this court later declared to be "settled law," that unincorporated territories, while not foreign countries in relation to the United States, are "foreign to the United States in a domestic sense." *Downes*, 182 U.S. at 341-342 (White, J., concurring); *see Balzac*, 258 U.S. at 305.

The district court was faithful to the letter and spirit of the *Insular Cases* doctrine. It recognized that not every fundamental right under the Equal Protection Clause in the fifty States automatically applies in insular commonwealths and territories, regardless of their local traditions, culture and conditions. "In the territorial context, the definition of a basic and integral

freedom must narrow to incorporate the shared beliefs of diverse cultures." *Wabol*, 958 F.2d at 1460.

The *Insular Cases* permit the flexible accommodation of local conditions by Congress and the sovereign insular people with whom the United States negotiated a unique political union. *Id.*; *see Balzac*, 258 U.S. at 309-311; *Mankichi*, 190 U.S. at 211, 218. The Senate Committee on Interior and Insular Affairs confirmed that

> [t]he commonwealth status of the Northern Mariana Islands was developed on the basis of their particular needs drawing on the experience of all other territories of the United States, especially those of Guam, with the advantages and disadvantages of which the people of the Northern Mariana Islands have first hand acquaintance.

S. REP. No. 433 at 65 (Leg. Exh. DD).

The determination by Congress and the people of the Northern Mariana Islands in the Covenant as to the practicability and application of constitutional provisions in the CNMI is entitled to great weight. *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 470 (1979). The CNMI's choice of legislative structure, and its assessment of the justification and need for that structure, also are entitled to "substantial deference." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).

"It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection." *Wabol*, 958 F.2d at 1460 n.18. As Appellees now will show, the undisputed evidence proved that the specific right claimed by Appellants – population-based bicameral legislative apportionment – is not a fundamental right under the *Insular Cases* because it is not the basis of all free government.

B. The Undisputed Evidence Proved That Population-Based Representation In Both Houses Of A Bicameral Legislature Is Not The Basis Of All Free Government

The district court properly granted summary judgment to Appellees, who presented overwhelming and undisputed evidence which proved that free governments often feature numerically equal legislative representation in one house of a bicameral legislature. In a decision applying *Reynolds* to the State of Hawaii, this court cautioned that constitutional violations "must appear from evidence in the record," and that "[s]peculations do not supply evidence [.]" *Burns v. Richardson*, 384 U.S. 73, 88 & n.14 (1966). Appellants failed to satisfy this requirement.

Appellants did not identify any nation or jurisdiction outside the United States which requires *Reynolds*-style population-based representation even in one house of a bicameral legislature, let alone in both houses. They presented no evidence that population-based representation in both houses of a bicameral legislature is the basis of *all* free government. Nor could they do so, since no such evidence exists. Appellants' failure to establish a genuine, material and triable factual issue mandated summary judgment for Appellees. FED. R. CIV. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-587 (1986).

As the district court held, the United States Senate is living proof that numerically *equal* legislative representation of each political unit sometimes is indispensable to a free government. J.S. App. 16a-17a. The inter-State population disparity in the United States Senate is far greater than the inter-island population disparity in the CNMI Senate. The approximate 60-to-1 disparity between California and Wyoming, for example, far exceeds the 20-to-1 disparity between Saipan and Rota. II Kurian, WORLD ENCYCLOPEDIA OF PARLIAMENTS AND LEGISLATURES 850 (Cong. Quarterly 1998) (WORLD

ENCYCLOPEDIA) (Def. Exh. 12). Wyoming's 480,000 residents thus share equal representation with over 32 million residents of California.

This equal representation has been at the heart of American constitutional federalism since 1787. *Reynolds*, 377 U.S. at 547-548, 574. "Rota and Tinian with their representatives took the strongest position that their interests had to be protected in this fashion and cited the U.S. Constitution as their example." *Marianas Political Status: Hearing Before The Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs* 94th Cong. 1st Sess. 93, 98 (1975) (*Marianas Status Hearing*) (statement of United States Ambassador Williams) (Leg. Exh. FF).

The bicameral Congress of Micronesia supplied a precedent from the TTPI which the Covenant's framers also found relevant. In 1964, the United States created the Congress of Micronesia (COM) in an effort to fulfill its Trusteeship Agreement duty to promote Micronesian self-government. The six TTPI districts each had two seats in the COM Senate, notwithstanding very significant population disparities between the districts. *E.g.*, INTERIOR DEPARTMENT SECRETARIAL ORDER NO. 2282, 29 FED. REG. 13613 (Sept. 28, 1964). The head of the United States' Covenant negotiating team and two congressional co-sponsors of the Covenant agreed that the COM Senate provided a strong precedent for the equal CNMI Senate representation mandated by Covenant Section 203(c). *Marianas Status Hearing* at 113-114 (statements of Ambassador Williams, Representative Lagomarsino and Representative Clausen) (Leg. Exh. FF).

The legislatures of the world's leading democracies further document that population-based representation in both houses of a bicameral legislature is not the basis of all free government. "Approximately one-third of the 170 or so national legislatures in the world are bicameral in form. All large western-style democracies have bicameral, or two-chamber, legislatures [.]"

WORLD ENCYCLOPEDIA 848 (Def. Exh. 12). The states of Australia and the provinces of Canada have numerically equal representation in the senates of those nations' bicameral legislatures. WORLD ENCYCLOPEDIA 850-851 (Def. Exh. 12). Thus, the Australian state of Tasmania, with fewer than 500,000 residents, has equal representation with the approximately 6.1 million residents of the state of New South Wales. I THE EUROPA WORLD YEAR BOOK 1999 (Europa Publications Ltd. 1998) 453 (WORLD YEAR BOOK) (Def. Exh. 13). Other democratic countries with bicameral legislatures, in which one house provides numerically equal representation to all political units, include Argentina, Brazil, Mexico, South Africa and Switzerland. WORLD ENCYCLOPEDIA 850 (Def. Exh. 12); WORLD YEAR BOOK 2976, 2984 (Def. Exh. 13); G.H. Flanz, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 30, 33, 52 (1998) (Def. Exh. 14).

Appellants failed to establish what the *Insular Cases* require: proof that population – based bicameral legislative apportionment is indispensable to *all* free government. Because the undisputed evidence established just the opposite, judgment for Appellees was required.

C. The Undisputed Evidence Proved That Equal Representation In The Northern Mariana Islands Senate Was Essential To Formation Of The Commonwealth Of The Northern Mariana Islands And To Its Political Union With The United States

The undisputed evidence below proved that equal representation in the CNMI Senate was essential to the CNMI's formation and to its negotiated political union with the United States. As Appellants acknowledge, the mandate of equal representation embodied in Covenant Section 203(c) "was demanded by the Rota and Tinian delegations to the Marianas Political Status Commission on the eve of the signing of the Covenant" in early 1975. J.S. 23. Appellees proved this point, and the necessity of Section 203(c) to the CNMI's formation and political union with the United States, by overwhelming and undisputed evidence.

As written by the lead consultants to the 1976 Northern Mariana Islands Constitutional Convention, whose analysis of the Covenant and the CNMI Constitution came into evidence:

> The provision for equal representation in the upper house of the legislature accomplished two purposes: it permitted the three islands to form a common political entity, and it permitted that political entity to affiliate with the United States. The compromise giving each major island equal representation in the senate was one of the essential requirements in securing the accession of the islands to a united political entity. The individual islands in the Northern Marianas were free not to participate in negotiations with the United States looking toward a common political status in union with the United States. Rota and Tinian are substantially smaller than Saipan in terms of both population and resources, and they were unwilling to accede to a permanent political union with Saipan without adequate protection of their separate interests in at least one house of the legislature.

Howard P. Willens and Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1400 (1977) (Def. Exh. 6).

> As the negotiating history of the Covenant demonstrates, this concession to the interests of the smaller islands of Rota and Tinian was essential in securing the agreement of the Northern Marianas to the Covenant. The demand for equal representation was unanimously supported by the Northern Marianas negotiators. Faced with the prospect that no status agreement would be achieved without this compromise, the United States representatives agreed to the proposal.

Id. at 1401 (Def. Exh. 6); *accord Hillblom v. United States*, 3 N. Mar. I. Commw. Rptr. 295, 297, 304-305 (D.N. Mar. Is. 1988); Leg. Exh.. C at 16 n.43 (CNMI Supreme Court opinion); Leg. Exh. D at 28-29 (CNMI Superior Court opinion).

The demand of Tinian and Rota for equal representation in the CNMI Senate stemmed from their dissatisfaction with Saipan's domination of the unicameral Marianas District Legislature during the trusteeship. The Marianas District Legislature was created and apportioned based on population by order of the United States' TTPI High Commissioner in 1963. Saipan had 11 representatives and Rota had 3 representatives. Tinian had 1 representative, as did the smaller islands north of Saipan. Pl. Exh. at 026-030; *Marianas Status Hearing* at 113-114 (statement of Ambassador Williams) (Leg. Exh. FF). This apportionment disadvantaged Tinian and Rota.

> Tinian and Rota . . . had been largely ignored by . . . the trust territory administration. Rota had been especially isolated. It had been shuffled around from district to district, sometimes being a district by itself. Rarely did an administrator visit Rota. Even after the creation of the Marianas District Legislature, the three representatives from Rota and the single Tinian representative had little voice in legislative affairs. Few funds went to Rota or Tinian for roads, utilities, schools or medical facilities.

HISTORY OF THE NORTHERN MARIANA ISLANDS 619-622 (Def. Exh. 7).

In light of this history, Tinian and Rota did not want Saipan to have disproportionate legislative power again. Tinian feared Saipan's willingness to give away Tinian's lands. MICRONESIA at 163 (Pl. Exh. at 111). Rota's concerns ran equally deep. On January 20, 1975, the Rota Municipal Council adopted a resolution demanding equal Senate representation to ensure the fair treatment of Rota and Tinian:

> *Under the present Trust Territory administration, Rotanese have consistently been treated as the poor cousins of our Saipan neighbors.* We have submitted budget requests which have been ignored, while the approved budget affecting Rota is controlled and administered by the District Administration on Saipan. We have sought financial assistance from the District Legislature for our Municipal Operating expenses and the response has been unsatisfactory . . . Recommendations made by our District Administrator's Representative and his department heads, our Municipal Council, and our Mayor have been consistently disregarded.
>
> The People of Rota wish to be a part of the Commonwealth of the Northern Mariana Islands. However, *the people of Rota cannot approve a form of government which will perpetuate the discrimination practiced in the past against our island community* . . . [¶]
>
> *The central government legislature must be bicameral, with a senate composed [of] equal representation from each of the present municipalities* and a House of Representatives based on population figures and traditional voting patterns. *This plan will help protect the interests of Tinian and Rota* while ensuring Saipan a healthy majority in the House of Representatives. *A bicameral legislature is essential to the fair and equal treatment of Tinian and Rota.*

Mot. App. 4a-5a (emphasis added).

The proposed Covenant was promptly revised to include Section 203(c). As the CNMI's Covenant negotiators later explained to CNMI voters:

> The establishment of the commonwealth involves compromise and concessions which reflect the

> different historical and geographic interests of the major islands in the Northern Marianas group, as well as population. If this sentence [203(c)] were not included [in the Covenant] Tinian and Rota would be limited to representation in the new commonwealth which is based entirely on population. The [Marianas Political Status] Commission concluded that, in light of the past experience of the people of Rota and Tinian and the need for their support of the Covenant, the protection afforded them by Section 203(c) was entirely appropriate and desirable.

Marianas Political Status Commission, *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands* 25 (Feb. 15, 1975) (Def. Exh. 1), *reprinted in H.J. Res. 549 Hearing* at 633-634 (Leg. Exh. CC).

The CNMI's formation and political union with the United States would have not have occurred without the inclusion of Section 203(c) in the Covenant. The Covenant Joint Drafting Committee and the CNMI's negotiators reported that Section 203(c) and the other fundamental provisions identified in Section 501(b) "constitute integral parts of the mutual compromises and concessions without which the accession of the Northern Mariana Islands to the United States would not have been possible." S. REP. No. 433 at 405 (Leg. Exh. DD); *accord H.J. Res. 549 Hearing* at 376, 640 (Leg. Exh. CC). The United States' lead Covenant negotiator confirmed to Congress that the United States agreed to Section 203(c) because the CNMI "made it a condition necessary for their approval of the Covenant." *Marianas Status Hearing* at 108 (statement of Ambassador Williams) (Leg. Exh. FF).

The evidence was undisputed and overwhelming. But for the Covenant's guarantee of equal representation in the CNMI Senate, there would not have been a CNMI or a political union

with the United States.[7] This uncontested fact required judgment for Appellees. So did the constitutional rationale of *Reynolds v. Sims*, as Appellees now will explain.

D. The Federal Analogy Discussed In *Reynolds v. Sims* Supports The Equal Senate Representation Mandated By The Covenant And The Northern Mariana Islands Constitution

Appellants misplace their reliance upon *Reynolds v. Sims*, the rationale of which in fact supports Covenant Section 203(c)'s mandate of equal representation in the CNMI Senate. J.S. i, 9-15. Section 203(c) is analogous to United States Constitution Article I, Section 3, which gives each State numerically equal representation in the United States Senate. The circumstances leading to equal Senate representation in both instances were not merely analogous. They were identical. In both instances, equal Senate representation was required to ensure political union. Without it, political union would not have occurred in either instance.

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7. Contrary to Appellants' claim (J.S. 15-25), it would be impractical and anomalous to mandate population-based apportionment of the CNMI Senate. Section 203(c) is one of the fundamental provisions of the Covenant which the United States pledged not to modify without the CNMI's consent. COVENANT SECTION 105. As stated by the Ninth Circuit, "[i]t would be truly anomalous to construe the equal protection clause to force the United States to break its pledge [.]" *Wabol*, 958 F.2d at 1462. It also would frustrate the core purpose of equal protection doctrine, which is to protect the rights of minorities such as the outnumbered residents of Tinian and Rota. *Id.* "If the federal courts hold that the principle of population alone must apply to the apportionment of the Northern Marianas Legislature . . . then the entire Northern Marianas agreement will be thrown into disarray. If one of its fundamental parts is invalid, then the very basis for the compact is imperiled." Paul M. Leary, THE NORTHERN MARIANAS COVENANT AND AMERICAN TERRITORIAL RELATIONS 27 (Univ. Calif., Berkeley, Institute of Governmental Studies, 1980-1981) (Leg. Exh. D at 30 n.15).

In *Reynolds v. Sims*, the State of Alabama tried to justify its malapportioned legislature by analogizing perceived county sovereignty issues in state legislative apportionment to State sovereignty concerns involved in the "Great Compromise" at the Constitutional Convention of 1787, which resulted in numerically equal State representation in the United States Senate. *See Reynolds*, 377 U.S. at 547-548, 574; *Wesberry v. Sanders*, 376 U.S. 1, 12-14 & n.27 (1964). This court rejected Alabama's federal analogy as inapposite.

> The system of representation in the two Houses of our Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic . . . [I]t is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government . . . [A]t the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to a single national government . . . The so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments . . . [A]t the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation . . . [¶] Political subdivisions of States - counties, cities or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental

> functions . . . The relationship of the States to the Federal Government could hardly be less analogous.

Reynolds, 377 U.S. at 574-575.

In contrast, the federal analogy *does* apply to the CNMI's formation and political union with the United States. The undisputed record shows that the compromise effected by the addition of Section 203(c) to the Covenant was the CNMI equivalent of the Great Compromise of 1787. An Administration report by the Office of Micronesian Status Negotiations reached essentially this conclusion in determining that Covenant Section 203(c) comported with the constitutional principles of *Reynolds v. Sims*.

> This provision was inserted at the insistence of the chartered municipalities of Rota and Tinian. Without the votes of their representatives in the Marianas Political Status Commission this Covenant could not have been concluded. This departure from the One Man-One Vote rule thus is justified under Reynolds v. Sims, 377 U.S. 533, 574 (1964). Moreover, the municipalities of Saipan, Tinian and Rota are not governmental subdivisions created by the Legislature, but are separate island communities with divergent histories, traditions and problems. *Id.* at 575.

H.J. Res. 549 Hearing at 385 (Leg. Exh. CC).

The 1976 CNMI Constitutional Convention which implemented Section 203(c) further explained that section's constitutionality and consistency with *Reynolds v. Sims*.

> [S]ection 203(c) of the Covenant reflected a compromise satisfactory to all representatives that the populous island of Saipan not dominate the legislature . . . [¶] Sound reasons of public policy support the constitutionality of the legislative arrangement established by the Covenant and

> implemented by the Constitution. First, unlike the underrepresented voters in Reynolds v. Sims, supra, the people of Saipan in the plebiscite on the Covenant freely and overwhelmingly approved the provision that gave Rota and Tinian a majority of the members in one house of the legislature. The people of Saipan relinquished the degree of control that its population alone would permit in order to achieve a form of government acceptable to all of the people of the Commonwealth. This relinquishing of power was done by the people themselves and not by representatives . . . In adopting the Covenant the Congress recognized the necessity for, and the value of, an equal apportionment of senators among the three municipalities . . . [¶] Second, the islands of Rota and Tinian differ from the rural counties whose control of the Alabama legislature was held unconstitutional by the Court in Reynolds. Rota, Saipan and Tinian are island communities separated by ocean and characterized by different customs and history. The people of each of these islands have a substantial need to protect their traditions. The Commonwealth shares the compelling interest to safeguard each of its indigenous island-societies. An equal voice in the senate for Rota, Saipan and Tinian is the means most narrowly tailored to the realization of this objective.

ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 29-31 (Dec. 6, 1976) (Def. Exh. 5).

As emphasized by the Covenant's chief congressional sponsor, inter-island legislative equality was *more* essential to the CNMI's formation than legislative equality among States was to formation of the Union that became the United States.

> Article II, section 203(c) . . . is based on the very large disparity in population between the municipalities on Saipan and the municipalities on the other islands . . . More importantly, the centuries-old history of the Mariana Islands is based on the tradition of the significance of land to the people and, therefore, the relative equality and independence of each island. In this respect, *the concept is even stronger than the original concept of the equality of our States* and we on the committee believe that this concept is understandable and acceptable.

122 CONG. REC. 7272-7273 (1976) (remarks of Representative Phillip Burton) (emphasis added) (Def. Exh. 3).

The federal analogy addressed in *Reynolds v. Sims* applies squarely here. Prior to the Covenant, the Northern Mariana Islands were independent sovereigns, as were the original thirteen States before entering the Union. *Ngiraingas*, 858 F.2d at 1371 n.1; *Ralpho*, 569 F.2d at 619 n.71; *Temengil*, 881 F.2d at 649 n.1, 650; *Porter*, 496 F.2d at 588 n.4; *Temengil*, 33 Fair Empl. Prac. Cas. at 1031-1032 & n.16; *People of Saipan*, 356 F. Supp. at 650 n.10, 653 n.18. Like these States, the Northern Mariana Islands surrendered part of their sovereignty and entered into a political union with each other and the United States, conditioned in part on equal Senate representation intended to preserve their "residuary sovereignty." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551-552 (1985); *see* MARIANAS POLITICAL STATUS COMMISSION POSITION PAPER ON LIMITATION OF FEDERAL AUTHORITY 31 (Dec. 6, 1973) (Leg. Exh. U). Because the federal analogy establishes a compelling basis for the constitutionality of Covenant Section 203(c) and CNMI Constitution Section 2(a), it provides an independent basis for summary affirmance.

CONCLUSION

This case does not present a substantial federal question warranting plenary review. It has no conceivable impact or importance beyond the distant borders of the Northern Mariana Islands. Moreover, the unanimous three-judge district court correctly entered judgment for Appellees on undisputed evidence and properly applied the *Insular Cases* doctrine. For these reasons, the judgment should be summarily affirmed without further briefing or oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS DATED AND FILED MAY 14, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

Civil Action No. 97-0029

JEANNE H. RAYPHAND and STANLEY T. TORRES,

Plaintiffs

v.

MIGUEL M. SABLAN, VICENTE N. ATALIG, GEORGE O. HOCOG, MARIA B. DIAZ, VICENTE H. BORJA, FRANCES M. SABLAN, RAMON A. TEBUTEB and CONNIE SEMAN-CAMACHO, Members, Board of Elections, and JUAN M. DIAZ, Executive Director, Board of Elections (in their official capacities only),

Defendants

UNITED STATES OF AMERICA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, MAYOR OF ROTA, MAYOR OF TINIAN, and ELEVENTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE,

Intervenors

JUDGMENT

PURSUANT TO the Order entered May 5, 1999, in which Defendants' motion for summary judgment was

granted and Plaintiff's motion for summary judgment was denied, judgment is hereby entered in favor of defendants and against plaintiffs.

Dated this 14th day of May, 1999.

s/ Galo L. Perez
Galo L. Perez
Clerk of Court

APPENDIX — ROTA MUNICIPAL COUNCIL RESOLUTION NO. 11MC-27-1975 ADOPTED JANUARY 20, 1975 AND FILED AS LEG. EXH. Q

11th Rota Municipal Council
First Regular Session, 1975

Resolution No. 11MC-27-1975
Introduced by: Council of the Whole

A RESOLUTION STATING THE POSITION OF THE PEOPLE OF ROTA, THROUGH THEIR ELECTED OFFICIALS, RELATIVE TO THE FUTURE GOVERNMENT OF THE NORTHERN MARIANA ISLANDS

WHEREAS, the people of Rota fully recognize that the future of Rota as well as the future of the rest of the Northern Mariana Islands will be greatly affected by decisions made during the Fifth Regular Session of the Mariana Islands District Legislature; and

WHEREAS, the Rota Municipal Council, speaking on behalf of the people of Rota seek to have its views heard and heeded by the members of the Mariana Islands District Legislature; and

WHEREAS, the Council cannot overemphasize the importance which it attaches to the following Position Statement and will closely observe to what extent it is recognized and acted upon by the Mariana Islands District Legislature; now, therefore,

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BE IT RESOLVED by the 11th Rota Municipal Council in its First Regular Session 1975, that the following Position Statement is hereby set forth for consideration by the Mariana Islands District Legislature and other interested parties:

The People of Rota are concerned over the proposed "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" which will most probably be signed by the Mariana Islands Political Status Commission and the United States delegation during the early part of February, 1975. That proposed Covenant provides for the establishment of a Constitution for the Future Government of the Northern Mariana Islands.

The concern felt by the people of Rota stems from both a disenchantment with the past and a guarded optimism about the future. Under the present Trust Territory Administration, Rotanese have consistently been treated as the poor cousins of our Saipan neighbors. We have submitted budget requests which have been ignored, while the approved budget affecting Rota is controlled and administered by the District Administration on Saipan. We have sought financial assistance from the District Legislature for our Municipal Operating expenses and the response has been unsatisfactory. Unfortunately, these requests were made necessary by a combination of factors including the limitations placed on our municipal taxing powers under the Trust Territory Code. Recommendations made by our District Administrator's Representative and his department heads, our Municipal Council, and our Mayor have been consistently disregarded.

Appendix

The people of Rota wish to be a part of the Commonwealth of the Northern Mariana Islands. However, the people of Rota cannot approve a form of government which will perpetuate the discrimination practiced in the past against our island community. To clearly indicate our intentions, we submit the following four proposals which must be adopted if Rota is to participate as a political part of the future government of the Northern Mariana Islands.

1. *Equal Numbers of Constitutional Conventions [sic] Delegates From Each Municipality.*
Each municipality must be provided an equal number of delegates to the constitutional convention provided for by the Mariana Islands District Legislature. In making this proposal, the Rota people are concerned most with creating a fair, representative, and harmonious constitutional convention. Any variation in the number of delegates from any single municipality should be made only after receiving the approval of each municipal council in the Mariana Islands District.

2. *Bicameral Legislature.*
The central government legislature must be bicameral, with a Senate composed of equal representation from each of the present municipalities and a House of Representatives based on population figures and traditional voting patterns. This plan will help protect the interests of Tinian and Rota while ensuring Saipan a healthy majority in the House of Representatives. A bicameral Legislature is indispensable to the fair and equal treatment of Tinian and Rota. In addition it would be in keeping with the proposed covenant which specifically permits "distribution of the Legislature's

membership on the basis of appropriate considerations in addition to population . . ." (see section 203 (c).)

3. *Local Budgetary Controls.*
Any governmental Framework created by the future constitution must provide for local control and disbursement of those monies made available to, what are now the municipalities. Both during the transition period and after the termination of the trusteeship agreement, each municipality must be given full authority over the administration of funds provided by the central government legislature.

4. *Plebiscite on Covenant and Referendum on Constitution to be Held Simultaneously.*
The Covenant and the Constitution, by their nature, will be closely related, interdependent documents. We feel strongly that the people of the Northern Mariana Islands should be given the opportunity to accept or reject them at one time. This will permit a longer period of political education and a smaller financial burden for our District Legislature; and

BE IT FURTHER RESOLVED, that certified copies of this resolution be transmitted to the Chairman of the Marianas Political Status Commission; to the President's Personal Representative for Micronesian Status Negotiations; to the President of the Mariana Islands District Legislature; to the Rota Representatives of the Mariana Islands District Legislature; to the District Administrator, Marianas; and to the District Administrator's Representative, Rota; also to the Secretary of the Department of the Interior; to the High

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Commissioner of the Trust Territory of the Pacific Islands; and to the Rota Representatives to the Marianas Political Status Commission.

Duly adopted this 20th day of January, 1975.

s/ Misael H. Ogo
Misael H. Ogo
Speaker

s/ Jesus A. Songsong
Attested by: Jesus A. Songsong
Council Secretary

APPENDIX — CONSTITUTIONAL PROVISIONS AND FEDERAL LAWS INVOLVED

Section 105 Of The Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America

The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

Pub. L. No. 94-241, 90 Stat. 263, 264, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 & note (West Supp. 1999).

Section 203(c) Of The Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America

The legislative power of the Northern Mariana Islands will be vested in a popularly elected

legislature and will extend to all rightful subjects of legislation. The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of the bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

Pub. L. No. 94-241, 90 Stat. 263, 265, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 & note (West Supp. 1999).

Section 501 Of The Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America

(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3 and 8; Article I, Section 10; Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26. . . . Other provisions of or amendments to the Constitution of the United States, which do not

apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and of the Government of the United States.

(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

Pub. L. No. 94-241, 90 Stat. 263, 267, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 & note (West Supp. 1999).

Northern Mariana Islands Constitution — Section 2(a)

The senate shall consist of nine members with three members elected at large from each of three senatorial districts. The first senatorial district shall consist of Rota, the second senatorial district shall consist of Tinian and Aguiguan, and the third senatorial district shall consist of Saipan and the islands north of it.

1 N. Mar. I. Code p. B-303; *see* J.S. 2.

Appendix

United States Constitution — Territorial Clause

Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. Const. Art. IV, Sec. 3, Cl. 2.

United States Constitution — Fifth Amendment Due Process Clause

No person shall . . . be deprived of life, liberty, or property, without due process of law [.]

U.S. Const. Amend. V.

United States Constitution — Fourteenth Amendment Equal Protection Clause

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.